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*Attorneys for Plaintiff*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
LARRY G. PHILPOT,

Index No.: 16-cv-1277

Plaintiff,

**COMPLAINT AND JURY DEMAND  
FOR DAMAGES FOR COPYRIGHT  
INFRINGEMENT**

v.

MUSIC TIMES LLC d/b/a MUSICTIMES.COM,

Defendant.  
-----X

Plaintiff LARRY G. PHILPOT, by and through his attorneys at GARBARINI FITZGERALD P.C., brings this Complaint and Jury Demand against Defendant MUSIC TIMES LLC d/b/a MUSICTIMES.COM based on infringement pursuant to the Copyright Act and Copyright Revisions Act, 17 U.S.C. §§ 101 *et seq.* (the “Copyright Act” or “Act”), and for a violation of the Digital Millennium Copyright Act at 17 U.S.C. § 103.

**JURISDICTION AND VENUE**

1. The jurisdiction of this Court is based upon 28 U.S.C. § 1331 in that this controversy arises under the Copyright Act and Copyright Revision Act of 1976 (17 U.S.C. § 101 *et seq.*).

2. Plaintiff has the right to bring the within action pursuant to 17 U.S.C. § 501(b).

3. The subject photographs were included in the compilation titled “All unpublished photos 2006 to May 2013” registered with the United States Copyright Office effective May 13, 2013, prior to the infringement by Defendant.

4. Personal jurisdiction over Defendant is proper in this Court on the ground that Defendant maintains a headquarters or otherwise resides in New York, NY.

5. The Court has personal jurisdiction over Defendant pursuant to CPLR § 302 (New York’s long-arm statute) due to their continuous and systematic business activities within New York as described below.

6. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391 (b) and (c).

7. A copy of the certificate issued by the U.S. Copyright Office is annexed incorporated hereto respectively as **Exhibit A**.

#### **PARTIES**

8. Plaintiff Larry G. Philpot (“PHILPOT”) is a professional photographer who has achieved significant acclaim as a photographer for concert events held throughout the United States. PHILPOT resides in Indianapolis, Indiana.

9. Upon information and belief, Defendant Music Times LLC, (“MTLLC”) is a New York limited liability company with a headquarters located at 305 Broadway, 14<sup>th</sup> Floor, New York, NY 10007.

#### **FACTS COMMON TO ALL COUNTS**

10. Plaintiff is a well-known photographer and earns a living licensing his photographs to businesses and musicians. Some examples of Plaintiff’s customers are AOL, AXS-TV, Berkshire Hathaway, KISS, John Mellencamp, and Willie Nelson.

11. Plaintiff has photographed hundreds of musical artists in addition to Kid Rock, including Chuck Berry, the Lumineers, REO Speedwagon, Hall and Oates, Norah Jones, John Mellencamp, Ted Nugent, Sir Paul McCartney, Mumford and Sons, Buddy Guy, and countless other top tier artists.

12. Plaintiff displays his work on his website <[www.soundstagephotography.com](http://www.soundstagephotography.com)>, and licenses his work for use by print and electronic publications. His work appears in a number of Wikimedia entries, Rock History Magazine, OnStage Magazine, AXS-TV (owned by Ryan Seacrest and Mark Cuban), Dan Rather Reports, Berkshire Hathaway, and Forbes. Plaintiff's work includes album covers as well as stunning portraiture and performance photographs.

13. Plaintiff is currently under a two year non-exclusive contract with AXS-TV, and in 2013 was contracted with Tom Petty for a single use of one of his images, and photographed Mr. Petty in both Indianapolis and Milwaukee.

14. Defendant MTLIC operates a website located at <[www.musictimes.com](http://www.musictimes.com)> (the "Subject Website"). Defendant without license or permission of any kind, impermissibly reproduced and distributed Plaintiff's copyrighted photographs of John Mellencamp and Norah Jones (collectively the "Copyrighted Photographs").

15. The Subject Website describes itself as follows:

Music fans can find the most comprehensive music coverage spanning across all genres on Musictimes.com. Indulge in original features, interviews, music reviews, trending stories, and more about your favorite pop, rock, country, classical, hip hop, christian (sic), latin (sic), and jazz artist.

Musicimes.com is the flagship music publication of Music Times, LLC, a global music digital media company headquartered in New York City.

## THE INFRINGEMENTS

16. The copyrighted John Mellencamp photograph (the “Mellencamp Photograph”) was reproduced and published without license or authority by Defendant MTLLC on or about December 6, 2013 at URL <[www.musictimes.com/articles/2678/20121206/john-mellencamp-85-new-songs-upcoming-tour.htm](http://www.musictimes.com/articles/2678/20121206/john-mellencamp-85-new-songs-upcoming-tour.htm)>. See **Exhibit B**.

17. The copyrighted Norah Jones photograph (the “Jones Photograph”) reproduced and published without license or authority by Defendant MTLLC on or about November 14, 2013 at URL <[www.musictimes.com/articles/2272/20131114/norah-jones-billie-joe-armstrong-release-silver-haired-daddy-mine.htm](http://www.musictimes.com/articles/2272/20131114/norah-jones-billie-joe-armstrong-release-silver-haired-daddy-mine.htm)>. See **Exhibit C**.

18. The Jones and Mellencamp Photographs (collectively the “Copyrighted photographs”) were the result of Plaintiff’s profound depth of experience in the field.

19. Defendant used the entire Copyrighted Photographs.

20. Allowing Defendant to use the Jones and Nelson Photographs without a license would substantially harm Plaintiff and reduce the value of the iconic photographs to zero.

## CREATIVE COMMENS ATTRIBUTION

21. As a general proposition, a copyright confers on the owner the exclusive right to reproduce the copyrighted work.

22. Absent a license from the copyright owner, which the owner is free to grant or deny, reproduction of the work by another constitutes copyright infringement.

23. The Copyrighted Photographs were published under a Creative Commons license on Wikipedia which expressly provided that a license was contingent on an attribution which contained Plaintiff’s name and a link to his website.

24. Creative Commons describes itself as “a nonprofit corporation dedicated to making it easier for people to share and build upon the work of others, consistent with the rules of copyright.” See CreativeCommons.org, About, <http://creativecommons.org/about>.

25. Creative Commons offers six main licenses with varying restrictions, but all six of the main licenses contain two primary restrictions:

[A] requirement that if the work is publicly distributed, displayed or performed, a copy of the Creative Commons license . . . must be included . . . [and] the second restriction common to all six licenses is one requiring attribution and specifying the manner in which the attribution should be accomplished.

26. The least restrictive license allows the user to manipulate the original in any manner so long as the author is credited. See CreativeCommons.org, Licenses, <http://creativecommons.org/about/licenses>. As of 2008, approximately 130 million works have been licensed under Creative Commons, which certainly suggests user support for attribution as a condition of using another’s work with the rules of copyright.

27. If everyone engaged in the same conduct as Defendants, it would cause substantial economic harm such that allowing the conduct would frustrate the purposes of copyright and force Plaintiff to withdraw his photographs.

28. As a prerequisite for a license, any potential licensee was expressly directed on Wikipedia to the attribution requirements before a license would issue which included placing the Plaintiff’s name and website URL below the use.

29. Defendant rejected this license, reproducing the Copyrighted Photographs with no attribution or with a “Wikipedia Commons” attribution.

30. At all times relevant to this Complaint, the Mellencamp page on Wikipedia provided the same attribution requirements as Jones.

31. The Wikipedia page for Norah Jones stated at all times relevant:

“This file is licensed under the Creative Commons Attribution-Share Alike 3.0 Unported license. You are free: to share – to copy, distribute and transmit the work to remix – to adapt the work. **Under the following conditions: attribution – You must attribute the work in the manner specified by the author or licensor** (but not in any way that suggests that they endorse you or your use of the work).”

See **Exhibit D**.

32. There has been no change in the Wikipedia requirements.

33. The terms mentioned on the page are very clear. When the potential licensee clicks on “Use this on the web”, they are given the mandatory attribution requirements: “By Nightshooter..Attribution: Photo Credit: Larry Philpot of [www.soundstagephotography.com](http://www.soundstagephotography.com). (Own work) [CC BY-SA 3.0 (<http://creativecommons.org/licenses/by-sa/3.0>)], via Wikimedia Commons.” See **Exhibit E**.

34. To assist the potential licensee, Wikipedia provides the **EXACT** HTML code necessary to get a license for the photograph, namely;

`<a title="By Larry Philpot (Own work) [CC BY-SA 3.0 (http://creativecommons.org/licenses/by-sa/3.0)], via Wikimedia Commons" href="https://commons.wikimedia.org/wiki/File%3ANorah.jpg"></a>`. See **Exhibit E**.

35. While the preceding code may look complicated, it is actually very simple. All the potential licensee has to do in order to get a license for this iconic photograph is cut and paste the HTML code provided into their website.

36. The potential licensee would have to go out of its way to avoid complying with such a simple system.

37. In fact, any potential licensee receives a pop-up that stops them, making it clear that they must first agree to, and follow, the exact attribution specifications of the Plaintiff before they copy the photograph. See **Exhibit F**.

38. So there are at least three explicit stop signs on Wikipedia informing the potential licensee what it must do to obtain a license; (1) the express language of the “use this on the Web”, (2) the “summary language” expressly stating the same, and (3) a pop-up window just in case the potential licensee somehow missed the first two.

39. The Plaintiff is a professional photographer, and these photographs are his only product, how he makes a living. Plaintiff gives away a small group of his iconic photographs on the express prerequisite that the potential licensee place Plaintiff’s name and URL below (or in the immediate vicinity) of the photograph.

40. Defendant elected to steal the Copyrighted Photographs, wipe them of all metadata, and reproduce and distribute the now wiped Copyrighted Photographs without attribution or with a “Wikipedia Commons” attribution.

41. Defendant was offered a license on very specific terms and rejected it. The fact that Defendant elected to reproduce the Copyrighted Photographs, even though it rejected the license, is intentional as defined by the Act.

#### **DEFENDANT’S VIOLATION OF THE DMCA**

42. Defendant generates its revenue through advertising.

43. The Defendant’s use of the Copyrighted Photographs was simply to illustrate the articles in which they were found. Simply, neither of the articles on the Subject Website, or the commentary, had any bearing on the photographs.

44. Photography is an art form that may require the photographer to make many important creative decisions.

45. A photographer is entitled to protection for such artistic elements as the particular lighting, the resulting skin tone on the subject, and the camera angle that he selected.

46. Both the Jones and Mellencamp Photographs took significant maneuvering and skill to obtain.

47. There were dozens of professional photographers at each show, yet the Plaintiff was the only one with the skill to pick the correct part of the stage, lighting, angle, aperture, and timing.

48. Additionally, Plaintiff was sponsored by John Mellencamp to go to Farm Aid where he took the Jones Photograph.

49. Years of hard work allowed Plaintiff to get access to the most advantageous lighting, angles, and timing.

50. Defendant simply copied the photographs, removed the attribution, refused to get a license, and intentionally attempted to infringe without consequence.

51. This violates the DMCA prohibition on wiping copyright information.

52. Other individuals copied Defendant, further disseminating the Copyrighted Photographs without license or attribution. See **Exhibit G**.

53. This type of predatory business tactic must be stopped.

#### **FAIR USE**

54. Plaintiff has a good faith belief that Defendant's offending activity was not fair use.

55. Defendant could not possibly believe there was high probability that their continued use constituted fair use.



**FIRST CLAIM FOR RELIEF  
COPYRIGHT INFRINGEMENT**

56. Plaintiff incorporates the allegations contained in the preceding paragraphs as if set forth at length here.

57. Defendant has, without license from Plaintiff, reproduced and/or publicly distributed the Copyrighted Photographs.

58. It cannot be disputed that Plaintiff has valid, registered copyrights, and that Defendant has reproduced and displayed the Copyrighted Photographs without a license, thus infringing Plaintiff's rights under the Copyright Act. Irreparable injury is presumed here as Plaintiff has established a prima facie case of copyright infringement.

59. Even after Defendant was put on notice that it had no license or authority, Defendant elected to continue to reproduce and display and/or distribute Plaintiff's Copyrighted Photographs.

60. The making or the distribution, or both, of the photographs associated with the Copyright Registrations without attribution or license is actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506 and 509.

61. Defendant's predatory conduct was clearly intentional within the meaning of 504(c)(2) for purposes of enhancing statutory damages. Defendant knew its actions constituted an infringement or at the very least acted with reckless disregard to Plaintiff's rights.

62. Defendant's knowledge and intent may be inferred from its conduct including the reckless disregard of Plaintiff's right (rather than actual knowledge of infringement), which suffices to warrant award of the enhanced damages.

63. As a direct and proximate result of each of the Defendant's infringement, Plaintiff has incurred actual damages in the form of license fees while Defendant has used Plaintiff's

Copyrighted Photographs for their own commercial gain in an amount that will be determined at trial. Plaintiff may also elect to recover statutory damages pursuant to 17 U.S.C. § 504(c)(2) for willful infringement of up to \$150,000, but not less than \$30,000, for each infringement of each copyright registration identified in **Exhibit A**, as available under the law.

**SECOND CLAIM FOR RELIEF  
VIOLATION OF DMCA  
17 U.S.C. § 1202**

64. Plaintiff incorporates the allegations contained in the preceding paragraphs as if set forth at length here.

65. Defendant intentionally removed or altered CMI knowing, or having reasonable grounds to know, that the removal will aid infringement. 17 U.S.C. § 1202(b).

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff prays for judgment against Defendant as follows:

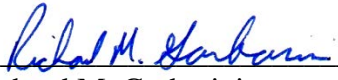
- A. statutory damages in the amount of \$150,000 per infringement for each Copyright Registration identified in the annexed **Exhibit A**, but in no case less than \$30,000 with respect to each infringement, or for such other amount as may be proper pursuant to 17 U.S.C. § 504(c);
- B. for Plaintiff's actual damage if Plaintiff so elects;
- C. For actual or statutory damages under the DMCA;
- D. attorneys' fees costs and disbursements in this action pursuant to 17 U.S.C. § 505 and 15 U.S.C. § 1117; and,
- E. For such other and further relief as the Court may deem just and proper.

**JURY DEMAND**

Plaintiff hereby demands a trial by jury of all issues so triable.

Dated: February 19, 2016

**GARBARINI FITZGERALD P.C.**

By:   
Richard M. Garbarini  
Richard M. Garbarini (RG 5496)  
250 Park Avenue  
7<sup>th</sup> Floor  
New York, New York 10177  
Telephone: (212) 300-5358  
Facsimile: (347) 218-9479

# **Exhibit A**





This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

*Maria A. Pallante*

Register of Copyrights, United States of America

Registration Number  
**Vau 1-164-648**

Effective date of  
registration:  
May 17, 2013

**Title**

Title of Work: All unpublished photos 2008 to May 2013

**Completion/Publication**

Year of Completion: 2013

**Author**

■ Author: Larry Gene Philpot

Author Created: photograph(s)

Work made for hire: No

Citizen of: United States

Domiciled in: United States

Year Born: 1953

**Copyright claimant**

Copyright Claimant: Larry Gene Philpot

12527 Winding Creek Lane, Indianapolis, IN, 46236

**Rights and Permissions**

Name: Larry Philpot

Email: larry@behindthemusic.net

Telephone: 317-567-1338

Address: 12527 Winding Creek Lane

Indianapolis, IN 46236 United States

**Certification**

Name: Larry G. Philpot

Date: May 14, 2013



DCF Document 1 File



DCF Document 1 File



## Exhibit B





## GENRES

## HOT TOPICS

Marielle Sellers Kristen O'Connor Clint Black

## LATEST NEWS

NQC Spring Break 2014 ...

STAY CONNECTED

By Nicole Oran

Dec 06, 2013 04:29 PM EST

## Rock

More Rock Articles ?

## John Mellencamp

More John Mellencamp photos, news and a full bio?

[Genres > Rock](#)

## John Mellencamp has written a whopping 85 new songs for upcoming tour

17

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John Mellencamp(Photo : Wikimedia Commons)

John Mellencamp has been lying low for a bit of time now, but he's coming back with a vengeance for his 2014 tour after signing with Universal. Not only does he already have a mature discography to pull from, he's coming back with a lot of new material.

"So I'm back on a major label," he told [Rolling Stone](#). "I've got a notebook with 85 new songs that I've written for my next record. T Bone Burnett is going to come out to Indiana sometime in early January and we're gonna go into the studio for however long it takes to make a new album. I haven't done one in five years."

Mellencamp has had a good relationship with Burnett after working with the iconic producer on his last two albums, 2008's *Life, Death, Love and Freedom* and 2010's *No Better Than This*.

"I never want to work with anyone else," Mellencamp said. "At least, I want to work with him as long as he wants to work with me. He's a minimalist. He was able to strip down all my songs. My



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WHAT'S POP

Feb 21, 2014 EDT

TobyMac, Skillet and LeCrae Hitting the Road [FULL SCHEDULE] ...

Feb 20, 2014 EDT

Josh Groban, Jason Mraz, Te and Sara and More Teaching at ...

2 hours ago

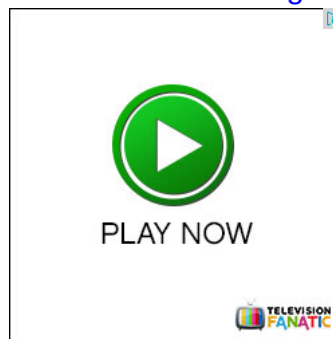
Nineties records were almost paint-by-numbers. He came in and said to me, "You don't need this part. You don't need that part. Take out these background vocals..."

Although there are no specifics yet on dates or venues, Mellencamp is looking forward to touring North America and the rest of the world. "I'm going to devise a show that works in arenas and theaters so I can go back and forth," he said. "Like anything else, if you do too much of one or the other you get burned out. I will probably never play outside again though. I really have a terrible taste in my mouth from playing outside. . . But I might though. I don't want to say never, but in my mind now I don't wanna play outside."

**Tags** [John Mellencamp](#)

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## FEATURED VIDEO : INTERVIEW WITH TIM MCGRAW, COUNTRY STAR



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Feb 21, 2014 EDT

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Feb 20, 2014 EDT

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Feb 17, 2014 EDT

Tomorrowland Sells Out Two Weekends Within An Hour ...

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Feb 18, 2014 EDT

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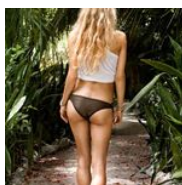


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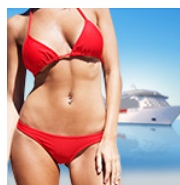
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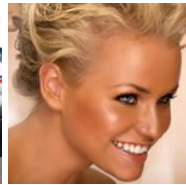
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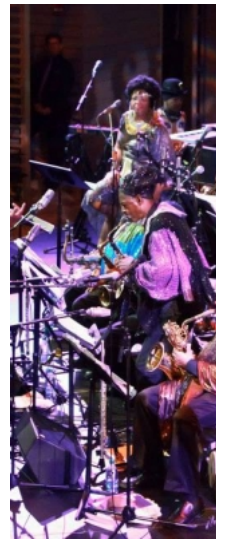
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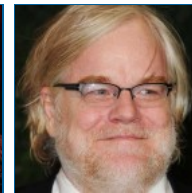
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Looks Like 'Duck Dynasty' Is Doomed After All



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## Albums

Feb 19, 2014 EDT

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Feb 12, 2014 EDT

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**Insane Clown Posse's Gathering of the Juggalos announces new location, ...**

1 comment • 20 days ago

☐ sean — gathering of the CLUELESS ,INBRED, BRAIN DEAD FUCKTARDS-DREGS OF SOCIETY and just downright ...

**'American Idol' Season 13 Recap: The Good, The Bad and The Meh from the ...**

1 comment • 5 days ago

☐ Bunky Prewster — I am beyond disgusted by the way Idol handled this. They exploited those girls, and humiliated them on ...

**Shania Twain staying in Las Vegas for residency, no tour or new album yet**

2 comments • 19 days ago

☐ Sandungajazz — MUST SEE NEVER-BEFORE-SEEN SHANIA FOOTAGE BELOW! FROM DEERHURST 1988. SHE ...

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## Exhibit C



Led Zeppelin has arrived. Listen on demand, only on Spotify. Play now Spotify

LATEST NEWS

By Nicole Oran  
Nov 14, 2013 06:20 PM EST

Rock  
More Rock Articles ?

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Justin Bieber Eggs Neighbors House, May Face Felony ...

Genres > Rock

## Norah Jones and Billie Joe Armstrong release 'Silver Haired Daddy of Mine' from their Everly Brothers album

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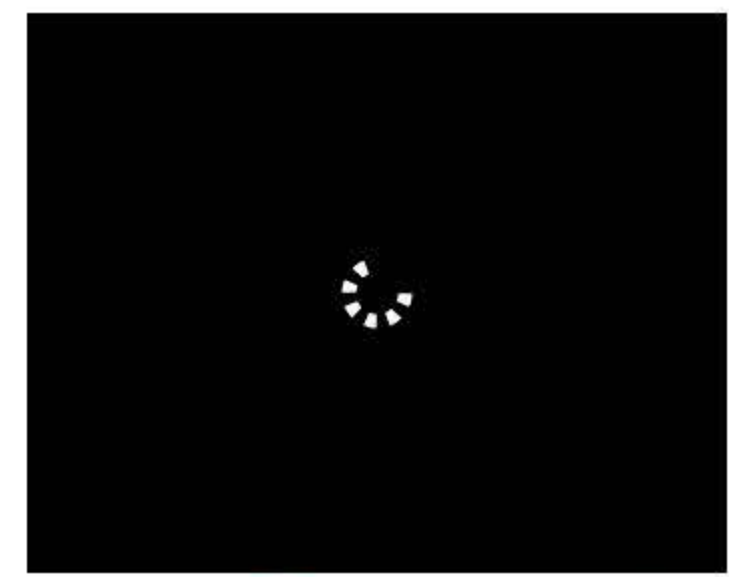
✓



Norah Jones and Billie Joe Armstrong (Photo : Wikimedia Commons)

As we have [recently reported](#), jazz star Norah Jones has teamed up with Green Day's Billie Joe Armstrong to pay homage to the Everly Brothers and the 1958 album, *Songs Our Daddy Taught Us*.

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### WHAT'S POPULAR NOW

Jan 09, 2014 EDT

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## Exhibit D



https://commons.wikimedia.org/wiki/File:Norah.jpg

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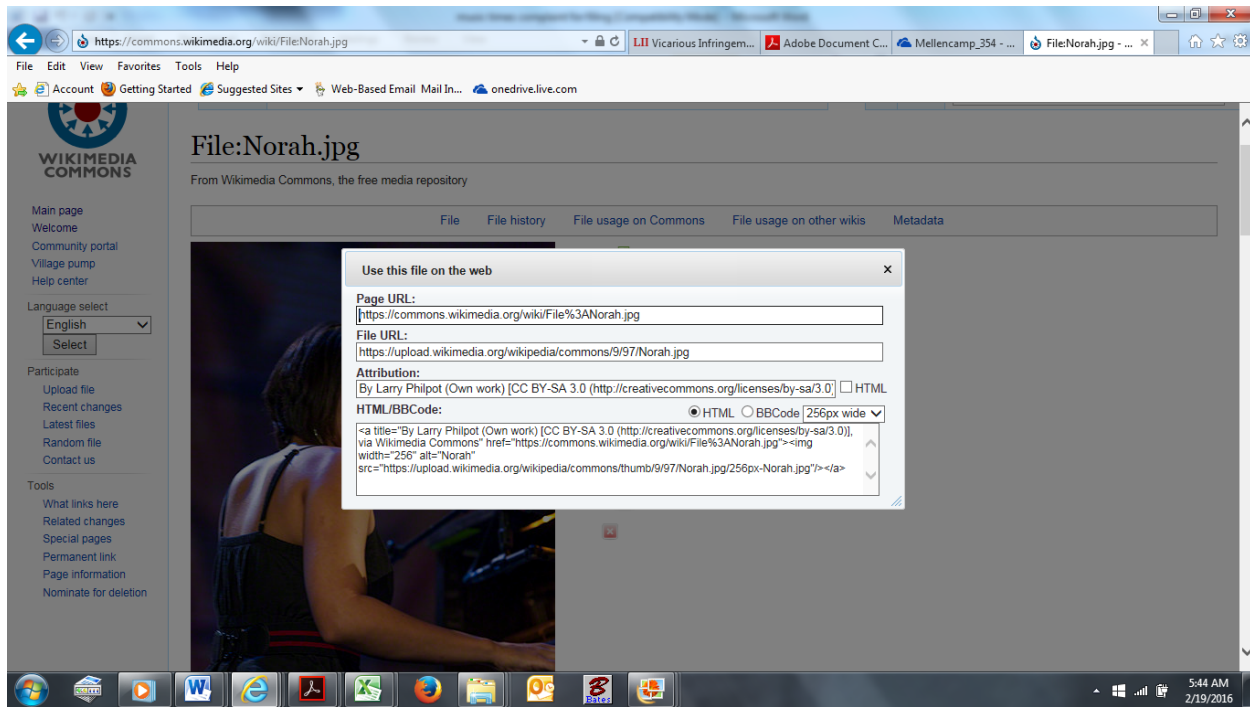
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## Exhibit E



## Exhibit F

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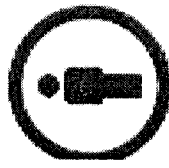
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**More info.**

## Exhibit G



